

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DANNIE LARCK,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 02-112-B-W
)	
JO ANNE B. BARNHART,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) appeal raises the questions whether the decisions of the commissioner at Steps 3 and 5 of the sequential review process are supported by substantial evidence and whether the commissioner failed to develop the record adequately. I recommend that the commissioner’s decision be affirmed.²

¹ This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. Oral argument was held before me on October 27, 2003, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

² In a section of the plaintiff’s statement of errors entitled “Specific Errors” the plaintiff also asserts that “[t]he errors here include . . . a lack of substantial evidence and/or inadequate findings to support the ALJ’s adverse credibility determination; [and] a failure to properly assess the claimant’s subjective pain,” Plaintiff’s Itemized Statement of Specific Errors (“Itemized Statement”) (part of Docket No. 5) at 4, but neither such error is pursued further in the plaintiff’s written submission. Both of these claims must accordingly be deemed to have been waived.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520, *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5.6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had acquired sufficient quarters of coverage to remain insured only through December 31, 1997, Finding 1, Record at 17; that he suffered from a lumbar disorder and cervical spondylosis, impairments that were severe but which did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 ("the Listings"), Findings 3-4, *id.* at 18; that his allegations regarding his physical limitations were not totally credible, Finding 5, *id.*; that he retained the residual functional capacity to perform work at the light exertional level, in that he could lift up to 20 pounds occasionally and 10 pounds frequently and could sit, stand and/or walk for up to six hours in an eight-hour workday, Finding 7, *id.*; that his capacity for light work was substantially intact and had not been compromised by any nonexertional limitations, Finding 14, *id.*; that he was unable to perform any of his past relevant work, Finding 8, *id.*; that given his age (closing approaching "advanced"), education (high school equivalent), lack of transferable skills and residual functional capacity to perform substantially all of the full range of light work, use of Rules 202.13 and 202.14 found in Appendix 2 to Subpart P, 20 C.F.R. Part 404 ("The Grid") as a framework for decision-making resulted in a conclusion that the plaintiff was not disabled, Findings 9-13, *id.*; and that he therefore was not under a disability at any time through the date of the decision, Finding 15, *id.* The Appeals Council declined to review the decision, *id.* at 4-5, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by

such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 3889, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential evaluation process, but the plaintiff also challenges his conclusion at Step 3. At Step 3, a claimant bears the burden of proving that his impairment or combination of impairments meets or equals an entry in the Listings. 20 C.F.R. § 404.1520(d); *Dudley v. Secretary of Health & Humans Servs.*, 816 F.2d 792, 793 (1st Cir. 1987. To meet a listed impairment, the claimant's medical findings (*i.e.*, symptoms, signs and laboratory findings) must match those described in the Listing for that impairment. 20 C.F.R. § 404.1525(d). To equal a Listing, the claimant's medical findings must be "at least equal in severity and duration to the listed findings." 20 C.F.R. § 404.1526(a). Determinations of equivalence must be based on medical evidence only and must be supported by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 404.1526(b). At Step 5, the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5(1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

The plaintiff first contends, Itemized Statement at 5-6, that the administrative law judge was required to adopt the conclusion of Frank A. Graf, M.D., that his physical impairments met section 1.05C of the Listings, Record at 436. He asserts that Dr. Graf's opinion in this regard is not inconsistent with any other medical evidence in the record. Itemized Statement at 6 n.3 & 7. However, resolution of the question

whether a claimant meets the criteria of any listing is reserved to the commissioner, 20 C.F.R. § 404.1527(e)(2); *Perkins v. Barnhart*, 266 F.Supp.2d 198, 205 (D. Mass. 2003), and no physician's opinion, whether that of a treating physician or that of an examining physician retained by the plaintiff for purposes of his benefits application, as was Dr. Graf in this case, carries controlling weight on this question. The administrative law judge found Dr. Graf's opinion "to be unpersuasive as it is inconsistent with his own findings, and is inconsistent with the weight of the medical evidence of record," which he went on to discuss. Record at 15. Contrary to the assertions of the plaintiff, Itemized Statement at 6, the administrative law judge did not "make direct medical analyses" by rejecting Dr. Graf's opinion after comparing it with other medical evidence in the record. Rather, the administrative law judge did precisely what he was supposed to do under the circumstances. The fact that there may be medical evidence in the record to support Dr. Graf's conclusion, *id.* at 6 n.3, only reinforces this point. It is the role of the administrative law judge to weigh conflicting evidence, which, contrary to the plaintiff's assertion, is present in the record on this point. If there is substantial evidence in the record to support the administrative law judge's choice, the courts may not overturn his conclusion. The plaintiff's contention that the administrative law judge was required to further develop the record on this point, *id.* at 6, is without merit. The plaintiff offers no other argument with respect to the decision at Step 3.

Contending that the record's only assessment by a physician of his residual functional capacity ("RFC") during the relevant period of time is that of Jonathan L. Holzaepfel, M.D., his treating physician, the plaintiff next argues that the administrative law judge's conclusion that he had an unrestricted RFC for light work at that time cannot stand. Itemized Statement at 8-9.³ He does not identify any portion of Dr.

³ The plaintiff also appears to suggest that Dr. Graf's report supports his contention that the medical evidence does not
(continued on next page)

Holzaepfel's records that specifically provides an assessment of RFC at the relevant time. There is an entry in those records dated March 4, 1997, which appears to be closest in time to the date last insured, where Dr. Holzaepfel noted his impression of chronic discogenic lower back pain by history and directed that the plaintiff not lift more than ten pounds. Record at 320. This cannot fairly be characterized as an assessment of RFC. Otherwise, the plaintiff relies on various medical reports from 1993 through 1995, Itemized Statement at 9-10. The administrative law judge reviewed the medical evidence from this period in his opinion, Record at 13, 15, as well as the medical evidence dated after the date last insured, *id.* at 13-16, before reaching his conclusion as to RFC. Unfortunately, the administrative law judge did not indicate that his conclusion was limited to the period before the date last insured. He did discuss in detail his reasons for rejecting the physical limitations identified by Dr. Holzaepfel in March 1998. *Id.* at 14-15. He does not address the findings of Drs. Clairmont and Hills on which the plaintiff also relies, Itemized Statement at 9-10. The only relevant findings of those treating physicians are Dr. Clairmont's statement in April 1993 that the plaintiff could sit, walk or stand for four hours each per workday, Record at 283, and Dr. Hills' statement in March 1995 that the plaintiff could lift no more than 10 pounds and could sit, walk or stand for two hours each per workday, *id.* at 279. The reports of two state-agency reviewing physicians, completed in August 1995 and September 1995, find that the plaintiff could lift up to 50 pounds occasionally and 25 pounds frequently and sit, stand or walk for a total of six hours each per workday, *id.* at 291, 296, 299, 305, limitations that are consistent with an RFC for medium work, which includes the capacity for light work, 20 C.F.R. § 404.1567(c). The opinions of the state-agency reviewers, reached during the relevant

show a capacity for light work. Itemized Statement at 9. Nothing in Dr. Graf's report, Record at 435-37, however, can reasonably be interpreted to state that Dr. Graf's findings concerned the plaintiff's condition before December 31, 1997, rather than as of May 9, 2001, the date of the report.

time period, are sufficient evidence to support the conclusions of the administrative law judge with respect to RFC. *Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994).

The plaintiff next contends that the administrative law judge erred in using the Grid to reach the conclusion that he was not disabled because, he asserts, the record demonstrates the existence of nonexertional impairments that make such reliance improper. Itemized Statement at 11-13. It is inappropriate to use the Grid at Step 5 where there is evidence of nonexertional impairments that have more than a slight effect on the exertional occupational base. Social Security Ruling 83-14, reprinted in *West's Social Security Reporting Service Rulings 1983-1991*, at 47-48; *Rose*, 34 F.3d at 19. The administrative law judge found that the plaintiff's "capacity for light work is substantially intact and has not been compromised by any nonexertional limitations." Finding 14, Record at 18. The plaintiff asserts that his significant nonexertional limitations are restrictions on bending, stooping, crouching, kneeling and reaching and pain. Itemized Statement at 12. Again, the medical evidence as to the alleged restrictions on this list other than pain is in conflict. The state-agency reviewers found no such limitations. Record at 292-93, 300-01. The fact that treating physicians noted such restrictions, *id.* at 279, 283, does not mean that the administrative law judge erred in rejecting their conclusions, on the basis of the record before him.

The plaintiff's argument concerning his pain as a nonexertional impairment is cursory at best. He merely asserts that "[t]he ALJ here apparently even refused to concede that Mr. Larck has pain, also a non-exertional impairment." Itemized Statement at 12. This undeveloped presentation is insufficient to provide the basis for remand.

This analysis makes it unnecessary to consider the contention of the commissioner at oral argument that the plaintiff was required to establish disability as of, and only on, December 30, 1997 due to the operation of the doctrine of *res judicata*. This assertion is based on the fact that a previous application for

benefits filed by the plaintiff was denied on July 9, 1997. Record at 10. That application alleged disability due to low back strain and problems with the left leg and foot. *Id.* at 325. The current application alleges disability due to back pain and cervical spondylosis. *Id.* at 11. If I were to consider this issue, I note that the sole case cited by counsel for the commissioner, *Deblois v. Secretary of Health & Human Servs.*, 686 F.2d 76 (1st Cir. 1982), is not helpful on the *res judicata* issue. Social Security Ruling 68-12a, reprinted in *West's Social Security Reporting Service Rulings 1960-1974*, cited by counsel for the plaintiff at oral argument, provides that *res judicata* will not bar consideration of a new application covering the same period of time when new and material evidence is provided, *id.* at 541. It is not possible, based on the administrative record presented to the court, to determine whether new and material evidence was presented in connection with the current application that was not presented in connection with the earlier application.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 31st day of October, 2003.

David M. Cohen

United States Magistrate Judge

Plaintiff

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